Supreme Court, U.S.
FILED

011328 MAR 11 2002

OFFICE OF THE CLERK

No. 01-___

IN THE

Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE,

Petitioner,

v.

CHARLOTTE J. PRITT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

MICHAEL E. TONER
Chief Counsel
THOMAS J. JOSEFIAK
Counsel
CHARLES R. SPIES
Deputy Counsel
REPUBLICAN NATIONAL COMMITTEE
310 First Street, S.E.
Washington, D.C. 20003
(202) 863-8638

Of Counsel

BOBBY R. BURCHFIELD
Counsel of Record
JASON A. LEVINE
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Attorneys for Petitioner

7888

QUESTION PRESENTED

Did the West Virginia Supreme Court of Appeals apply an incorrect standard for reviewing entry of summary judgment against the defamation claims of respondent, a candidate for Governor of West Virginia and a public figure, by failing to make an independent determination whether respondent had come forward in opposition to a well-supported motion for summary judgment with clear and convincing evidence of actual malice, as required by *New York Times Co. v. Sullivan, Anderson v. Liberty Lobby, Inc.*, and other decisions of this Court?

PARTIES TO THE PROCEEDING

The following were parties to the proceeding in the West Virginia Supreme Court of Appeals: plaintiff Ms. Charlotte J. Pritt, and defendants the Republican National Committee, the National Republican Senatorial Committee, and the West Virginia State Victory Committee. Each defendant is an unincorporated political association. The National Republican Senatorial Committee and the West Virginia State Victory Committee will be filing a separate Petition for a Writ of Certiorari.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 3

STATEMENT OF THE CASE 3

The Facts Giving Rise to this Case 4

Proceedings in the Trial Court 6

Proceedings in the Supreme Court of Appeals 8

REASONS FOR GRANTING THE WRIT 12

I. THE DECISION BELOW IS CONTRARY TO THIS COURT'S CLEAR RULINGS ON THE ROLE OF APPELLATE COURTS IN PUBLIC FIGURE DEFAMATION CASES 12

A. In Public Figure Defamation Cases, the First Amendment Requires Independent Appellate Review To Assure That the Record Contains Clear and Convincing Evidence of Actual Malice.....13

B. The Requirement for Independent Review To Assure That the Record Contains "Clear and Convincing" Proof of Actual Malice Applies at the Summary Judgment Stage of a Public Figure Defamation Case 16

C. The Supreme Court of Appeals Failed To Review the Record and Failed To Apply the "Clear And Convincing" Standard of Proof for Actual Malice 18

II. THE DECISION BELOW CONFLICTS WITH RULINGS FROM THE VAST MAJORITY OF STATE COURTS AND FEDERAL COURTS OF APPEALS.....19

III. IF NOT CORRECTED, THE DECISION BELOW WILL HAVE PROFOUND CONSEQUENCES FOR POLITICAL SPEECH IN WEST VIRGINIA AND ADJACENT STATES 24

CONCLUSION 28

APPENDIX 1a

TABLE OF AUTHORITIES

CASES

Page

Anderson v. Liberty Lobby, 477 U.S. 242 (1986).....*passim*

Anderson v. McCotter, 100 F.3d 723 (10th Cir. 1996) 23

Bartimo v. Horsemen's Benevolent & Protective Ass'n, 771 F.2d 894 (5th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986).....23

Bose Corp. v. Consumers Union of the U.S., Inc., 466 U.S. 485 (1984).....15, 16, 19, 21

Buckley v. Valeo, 424 U.S. 1 (1976) 2, 24, 26, 27

Carr v. Bankers Trust Co., 546 N.W.2d 901 (Iowa 1996) 21

Chesapeake Publ'g Corp. v. Williams, 661 A.2d 1169 (Md. 1995).....22

Cobb v. Time, Inc., No. 00-5159, 2002 WL 112477 (6th Cir. Jan. 30, 2002).....23

Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996).....24

Contemporary Mission, Inc. v. New York Times Co., 842 F.2d 612 (2d Cir.), *cert. denied*, 488 U.S. 856 (1988).....23

Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).....2, 3

Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).....14

Dababnah v. West Va. Bd. of Med., 47 F. Supp.2d 734 (S.D. W. Va. 1999).....10

Dale v. Ohio Civil Serv. Employees Ass'n, 567 N.E.2d 253 (Ohio), *cert. denied*, 501 U.S. 1231 (1991) 22

Deaver v. Hinel, 391 N.W.2d 128 (Neb. 1986) 22

Diesen v. Hessburg, 455 N.W.2d 446 (Minn. 1990), *cert. denied*, 498 U.S. 1119 (1991) 22

DiLeo v. Koltnow, 613 P.2d 318 (Colo. 1980) 21

Dombey v. Phoenix Newspapers, Inc., 724 P.2d 562 (Ariz. 1986) 21

Eu v. San Francisco Cty. Democratic Cen. Comm., 489 U.S. 214 (1989) 25

Fitzgerald v. Tucker, 737 So.2d 706 (La. 1999) 21

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 2

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 14

Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler, 398 U.S. 6 (1970) 20

Guilford Transp. Indus., Inc. v. Wilner, 760 A.2d 580 (D.C. 2000) 20, 21

Gulf Publ'g Co., Inc. v. Lee, 434 So.2d 687 (Miss. 1983) 22

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) 16

Herbert v. Oklahoma Christian Coalition, 992 P.2d 322 (Okla. 2000) 22

Journal-Gazette Co., Inc. v. Bandido's, Inc., 712 N.E.2d 446 (Ind.), *cert. denied*, 528 U.S. 1005 (1999) 20, 21

Kanaga v. Gannett Co., Inc., 687 A.2d 173 (Del. 1996) 21

Levan v. Capital Cities/ABC, Inc., 190 F.3d 1230 (11th Cir. 1999), *cert. denied*, 528 U.S. 1198 (2000) 23

Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122 (1st Cir. 1997) 23

Liberty Lobby, Inc. v. Rees, 852 F.2d 595 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1010 (1989) 23

Lyons v. Rhode Island Pub. Employees Council, 559 A.2d 130 (R.I.), *cert. denied*, 493 U.S. 892 (1989) 22

MacGuire v. Harriscope Broad. Co., 612 P.2d 830 (Wyo. 1983) 22

Mahoney v. Adirondack Publ'g Co., 517 N.E.2d 1365 (N.Y. 1987) 22

Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) 23

Margoles v. Hubbart, 760 P.2d 324 (Wash. 1988) 22

Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) 11, 18, 19

McAvoy v. Shufrin, 518 N.E.2d 513 (Mass. 1988) 22

McCoy v. Hearst Corp., 727 P.2d 711 (Cal. 1986), *cert. denied*, 481 U.S. 1041 (1987) 21

Miami Herald Publ'g Co. v. Ane, 458 So.2d 239 (Fla. 1984) 22

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) 2, 3

Mills v. Alabama, 384 U.S. 214 (1966) 24

Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) 16, 24

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) ..... *passim*

Newton v. NBC, Inc., 930 F.2d 662 (9th Cir.), *cert. denied*, 502 U.S. 866 (1991) 23

Peeler v. Spartan Radiocasting, Inc., 478 S.E.2d 282 (S.C. 1996), *cert. denied*, 520 U.S. 1275 (1997) 22

Pemberton v. Birmingham News Co., 482 So.2d 257 (Ala. 1985) 21

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) 3, 27

Pritt v. Republican Nat'l Comm., et al., 557 S.E.2d 853 (W. Va. 2001) ..... *passim*

Pritt v. Republican Nat'l Comm., et al., No. 97-C-380(V) (W. Va. Cir. Ct. Fayette Cty. May 15, 2000) ..... *passim*

Reuber v. Food Chem. News, Inc., 925 F.2d 703 (4th Cir.), *cert. denied*, 501 U.S. 1212 (1991) 23

Rouch v. Enquirer & News of Battlecreek Michigan, 487 N.W.2d 205 (Mich. 1992), *cert. denied*, 507 U.S. 967 (1993) 22

Secrist v. Harkin, 874 F.2d 1244 (8th Cir.), *cert. denied*, 493 U.S. 933 (1989) 22, 23

Stromberg v. California, 283 U.S. 359 (1931) 24

Thomson Newspaper Publ'g, Inc. v. Coody, 896 S.W.2d 897 (Ark.), *cert. denied*, 516 U.S. 1008 (1995) 21

Time, Inc. v. Pape, 401 U.S. 279 (1971) 16

Torgerson v. Journal/Sentinel, Inc., 563 N.W.2d 472 (Wisc. 1997) 22

Tucci v. Guy Gannett Publ'g Co., 464 A.2d 161 (Me. 1983) 21, 22

Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 655 A.2d 417 (N.J. 1995), *cert. denied*, 516 U.S. 1066 (1996) 22

Turner v. KTRK Television, Inc., 38 S.W.3d 103 (Tex. 2000) 21

Wanless v. Rothballer, 503 N.E.2d 316 (Ill.), *cert. denied*, 482 U.S. 929 (1987) 21

Wiemer v. Rankin, 790 P.2d 347 (Idaho 1990) 21

Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) 19, 20

CONSTITUTION

U.S. Const. amend. I 3

STATUTES, RULES AND REGULATIONS

28 U.S.C. § 1257(a) 1

U.S. Supreme Court Rule 13(1) 1

W. Va. Code § 3-8-11(c) 7

W. Va. R. App. P. 3 8

W. Va. R. App. P. 29(g) 9

MISCELLANEOUS

Annenberg Public Policy Center, *Issue Advertising in the 1999-2000 Election Cycle* (Feb. 1, 2001) 26

Brennan Center for Justice, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* (2002) 26

Kathleen Hall Jamieson, *Everything You Think You Know About Politics . . . And Why You're Wrong* (2000) 27

Warren Communications News, *Television & Cable Fact Book* (2001) 26, 27

W. Va. J. Hse. of Del. 1624-25 (Mar. 10, 1989) 6

W. Va. J. Hse. of Del. 545-46, 638, 665-67 (Feb. 11, 1986) 6

W. Va. J. of the Senate 3 (Mar. 8, 1991) 6

W. Va. J. of the Senate 150-51 (Jan. 24, 1991) 6

W. Va. J. of the Senate 481-82 (Feb. 15, 1990) 6

W. Va. Senate Bill 531, Comm. Print 89R1025 (Mar. 20, 1989) 6

PETITION FOR A WRIT OF CERTIORARI

The Republican National Committee ("RNC") respectfully petitions this Court for a Writ of Certiorari to review a decision of the West Virginia Supreme Court of Appeals.

OPINIONS BELOW

The decision of the West Virginia Supreme Court of Appeals is reported at 557 S.E.2d 853. Appendix ("App.") 1a. The earlier ruling of the Circuit Court of Fayette County, West Virginia, entering summary judgment on behalf of the RNC is unpublished but appended hereto. App. 24a.

JURISDICTION

The decision that is the subject of this Petition was entered on December 12, 2001, and this Petition is timely filed. S. Ct. Rule 13(1). The Supreme Court of Appeals rendered a judgment involving an issue of central importance to defamation suits brought by public figures: the appellate court's duty, in reviewing a defamation suit, to conduct its own "independent review" to assure that the record contains clear and convincing evidence of actual malice, before allowing the suit to proceed to trial. This issue implicates the First Amendment, as applied to the States by way of the Fourteenth Amendment. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

If not reversed, the trial court's entry of summary judgment would have ended this litigation. Similarly, resolution by this Court of the issue presented in the manner advocated by the RNC will end this litigation. Moreover, the availability and proper use of summary judgment is especially important in defamation cases because the very threat of a burdensome, expensive, and uncertain jury trial in a defamation case has a propensity to suppress speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). The likely effect of denying this Petition would be to chill the

exercise of First Amendment rights by the RNC and all other political speakers in West Virginia until the Supreme Court of Appeals' erroneous view of summary judgment in defamation cases is ultimately corrected by this Court.

This is a case in which "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" *and* refusal of immediate review by this Court "might seriously erode federal policy." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975) (exercising jurisdiction over Georgia Supreme Court decision that reversed summary judgment and remanded for trial after upholding "rape shield" law against First and Fourteenth Amendment challenge). Because respondent here has identified no evidence of actual malice by the RNC, a reversal of the judgment would result in a reinstatement of summary judgment on all of respondent's claims, and thus preclude further litigation. Moreover, a refusal of immediate review by this Court would "seriously erode" the federal policy of protecting core political speech, "an area of the most fundamental First Amendment activities." *Buckley v. Valeo,* 424 U.S. 1, 14-15 (1976). Indeed, this Court has observed that "[a]djudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits an exception to the general finality rule." *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46, 55 (1989).

This Court exercised jurisdiction in a similar procedural setting in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). There, a candidate for public office sued a newspaper for violating a state statute that purportedly guaranteed him a right of reply to an editorial. The trial court invalidated the statute on First Amendment grounds, but the Florida Supreme Court reversed and remanded for trial. This Court exercised jurisdiction, ruling that "it would be intolerable to leave unanswered" an

important First Amendment question pending a trial because "an uneasy and unsettled constitutional posture" can only harm free speech. *Id.* at 247 n.6. *See also Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) (discussed below at pages 16-18). That conclusion applies equally here. The threat to the First Amendment rights of political speakers posed by the decision below supports review by this Court. *See Cox*, 420 U.S. at 485-86 (refusing to delay "final decision of the First Amendment claim until after trial").[1]

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. Const. amend. I.

STATEMENT OF THE CASE

This case strikes at the heart of the First Amendment. In reversing the trial court's entry of summary judgment on the defamation claims of respondent Charlotte Pritt, the Supreme Court of Appeals misunderstood or ignored the

---

[1] Without addressing the basis for jurisdiction, this Court granted certiorari in a procedural posture similar to this case in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). There, the Pennsylvania Supreme Court reversed a judgment against a private figure plaintiff's defamation claims because the trial court did not give a statutory jury instruction imposing on defendant the burden of proving its statements were true. *Id.* at 771. Although the Pennsylvania Supreme Court remanded for a new trial, this Court granted certiorari and *reversed*, ruling that plaintiffs bear the burden of proving falseness. *Id.* at 777. In relevant part, the Court observed that the "common-law presumption" embodied in the disputed jury instruction would impose a "chilling effect" on defamation defendants that is "antithetical to the First Amendment." *Id.* As discussed herein, analogous constitutional problems also infect the decision of the West Virginia court.

strict constitutional requirements governing its review. Although this Court has repeatedly ruled in public figure defamation cases that the First Amendment requires an independent appellate determination of whether plaintiff adduced clear and convincing evidence of actual malice, here the Supreme Court of Appeals *failed* to conduct an independent review of the record and *failed* to apply the "clear and convincing" standard with respect to actual malice. For these reasons, the decision below contravenes settled First Amendment law, conflicts with rulings from the vast majority of state courts and federal courts of appeals, and threatens to stifle core political speech throughout the State of West Virginia and adjacent States.

The Facts Giving Rise to this Case

Respondent Charlotte Pritt served in the West Virginia House of Delegates from 1985 to 1989 and in the State Senate from 1989 to 1993. Ms. Pritt ran unsuccessfully for the office of Governor of West Virginia in 1992 and 1996. She admits to being a "public figure" for purposes of this case. App. 9a.

In 1992, Ms. Pritt lost the Democratic gubernatorial nomination to the incumbent, Gaston Caperton, who aired advertisements criticizing a number of her votes as a state legislator. During her 1996 gubernatorial primary campaign, Ms. Pritt again faced advertisements aired by her opponent, State Senator Joseph Manchin, criticizing those same votes in the state legislature. Ms. Pritt won the Democratic nomination for Governor on May 7, 1996, and faced Republican Cecil Underwood in the general election. App. 6a-7a.

From October 24 until Election Day, the West Virginia State Victory Committee ("Victory Committee") aired radio and television advertisements commenting, again, on the *same votes* that Ms. Pritt's Democratic opponents had

criticized during the 1992 and 1996 gubernatorial primary campaigns. These advertisements were paid for by the National Republican Senatorial Committee ("NRSC"), which, in compliance with state law, had created the Victory Committee as the formal sponsor of the spots.[2]

The television advertisement stated (App. 37a):

> Behind Charlotte Pritt's campaign smile is a liberal voting record she can't hide from. In the State Senate, Charlotte Pritt proposed teaching first graders about condoms. Surprised? You shouldn't be. Senator Pritt also voted to permit the sale of pornographic videos to children. She even voted to allow convicted drug abusers to work in our public schools. Look behind the smile. Charlotte Pritt. Wrong on the issues. Wrong for West Virginia.

The radio advertisement stated (App. 6a):

> Behind Charlotte Pritt's campaign smile is a liberal voting record she can't hide from. In the State Senate, Charlotte Pritt proposed teaching first graders about condoms. Surprised? You shouldn't be. Senator Pritt also voted to permit the sale of pornographic videos to children. She even voted to allow convicted drug abusers to work in our public schools. If parents can't trust Charlotte Pritt to protect our children, think also of our veterans. Charlotte Pritt voted against honoring the men and women of West Virginia who fought in the Gulf War. Senator Pritt voted to allow the burning of the American Flag that our veterans fought so hard to

---

[2] The RNC neither created nor sponsored the advertisements about Ms. Pritt, and neither the trial court nor the Supreme Court of Appeals considered whether the RNC was a proper defendant.

> defend. She even opposed requiring students to begin their day with the Pledge of Allegiance. Look behind the smile. Charlotte Pritt. Wrong on the issues. Wrong for West Virginia.

The statements in the advertisements were based on Ms. Pritt's voting record as a West Virginia state legislator.[3] Ms. Pritt lost the gubernatorial election.

Proceedings in the Trial Court

On October 31, 1997, Ms. Pritt filed her initial Complaint, which she amended on October 26, 1998. The Amended Complaint asserted four causes of action against the RNC, the NRSC, and the Victory Committee (collectively, "the Committees"). App. 26a. Count I alleged that the Committees defamed Ms. Pritt through certain statements in the advertisements described above. Count II alleged that through these statements the Committees

---

[3] The Committees contended, and the trial court found, that the advertisements were true. The Supreme Court of Appeals did not address this issue. Ms. Pritt: (1) sponsored a bill requiring public schools to teach students from kindergarten through the twelfth grade about "contraception" (W. Va. Senate Bill 531, Comm. Print 89R1025, Mar. 20, 1989); (2) voted against an amendment banning the sale of "X"-rated videotapes to minors (*W. Va. J. of the Senate* 481-82, Feb. 15, 1990); (3) voted against an amendment banning public schools from employing any person who had been convicted of the use or possession of controlled substances (*W. Va. J. Hse. of Del.* 1624-25, Mar. 10, 1989); (4) voted against a Resolution to "honor" West Virginians "serving America in Operation Desert Storm" (*W. Va. J. of the Senate* 150-51, Jan. 24, 1991); (5) voted against a Resolution urging a federal constitutional amendment to ban flag-burning (*W. Va. J. of the Senate* 3, Mar. 8, 1991); and (6) voted against a bill requiring students to recite the Pledge of Allegiance in the public schools unless they opted out of the ceremony (*W. Va. J. Hse. of Del.* 545-46, 638, 665-67, Feb. 11, 1986).

violated W. Va. Code § 3-8-11(c), which imposes criminal penalties for the publication of known falsehoods about a candidate for public office. Count III asserted that two of the statements were defamatory *per se*. Count IV asserted a claim for "false light" invasion of privacy. Ms. Pritt demanded $2 million in compensatory damages and $10 million in punitive damages.

Discovery closed as scheduled on May 15, 1999, with Ms. Pritt making *no effort* to depose any representative of the Committees. On June 15, 1999, the Committees filed a joint motion for summary judgment. The Committees contended that all four Counts of the Amended Complaint were barred because each of the statements at issue was either true or editorial opinion, and because the record contained no evidence of actual malice – that is, that the Committees published the advertisements with knowledge that they were false or with a "reckless disregard" for whether they were false or not. *New York Times*, 376 U.S. at 279-80.[4]

On May 15, 2000, after hearing argument on the motion, the trial court granted the Committees' motion for summary judgment. In part, the trial court ruled:

> As a former state legislator and candidate for the office of Governor, plaintiff is a "public figure" for purposes of this lawsuit. . . .

---

[4] The Committees also contended that: (1) all four Counts were barred by a one-year statute of limitations; (2) Count II was barred because W. Va. Code § 3-8-11(c) is a criminal provision with no private right of action; (3) Count IV was barred because the statements at issue involved a public figure and matters of public interest, and were not subject to a "false light" claim; and (4) Ms. Pritt could not prove causation of any injury. The trial court's rulings on falseness and actual malice were dispositive, so it did not decide these other issues. App. 28a n.1. Neither did the Supreme Court of Appeals.

> As a public figure, plaintiff must prove by "clear and convincing evidence" that the statements at issue were both false and published with "actual malice" – that defendants had "knowledge at the time of publication that they were false" or published them with "reckless and willful disregard for the truth.". . .
>
> Summary judgment on all four Counts is warranted because the statements at issue are not false. Defendants analyzed the legislative record and explained at length why all but one of the statements at issue are true, and why the last one is a protected expression of opinion. . . . In particular, defendants set forth plaintiff's legislative votes that supported each statement and countered the interpretations giving rise to plaintiff's claims. . . .
>
> Summary judgment on all four Counts is also warranted because there is no record evidence that any defendant acted with "actual malice."

App. 26a-27a. Ms. Pritt sought reconsideration, which was denied on June 13, 2000. App. 29a.

Proceedings in the Supreme Court of Appeals

On appeal,[5] Ms. Pritt presented several arguments, but only her challenge to the trial court's disposition of the actual malice issue is pertinent to this Petition. Since each of Ms. Pritt's claims is based upon the very same advertisements as her defamation claim, the trial court correctly ruled, and the Supreme Court of Appeals implicitly accepted, that each

---

[5] West Virginia has no intermediate appellate court, and Ms. Pritt sought direct review by the Supreme Court of Appeals by filing a petition for appeal. *See* W. Va. R. App. P. 3. She filed her amended petition on December 8, 2000, and it was granted on April 3, 2001. App. 30a.

of her claims is subject to the actual malice requirement. App. 17a-18a, 26a.

In her reply brief, Ms. Pritt set forth the following assertions as supporting a finding of actual malice:

> Evidence of malice includes, inter alia, the cloak and dagger manner in which the [West Virginia State Victory] committee was surreptitiously created just before the election, the dishonesty of the committee's self-portrayal as being sponsored and paid for by the contributions of West Virginians, the time frame just before the election when the ads were aired, providing the Appellant no legitimate opportunity to respond, the vituperative nature of the content of the ads and their obvious intent to shock the consciences of West Virginia voters with statements that were patently false; and the pattern of conduct of the Republican National Committee.

Reply Br. at 13. None of these assertions, even if proved, is sufficient to demonstrate actual malice. Ms. Pritt pointed to no evidence in the record, much less clear and convincing evidence, to demonstrate that the Committees knew or recklessly disregarded that the advertisements were false.

In its decision, the Supreme Court of Appeals focused on whether there were "genuine issues of material fact" sufficient to preclude summary judgment. App. 16a.[6] After

---

[6] Three of five justices on the Supreme Court of Appeals were campaigning with Ms. Pritt at the time the advertisements at issue were airing. Only one of those three recused, and was replaced by Circuit Judge John T. Madden. App. 1a. The lower court's rules vest the decision to recuse in the unreviewable discretion of the affected justice. In the event of recusal, the Chief Justice has the unreviewable discretion to appoint any sitting trial court judge in West Virginia to sit for the case. W. Va. R. App. P. 29(g).

(continued...)

citing (App. 12a-15a) various formulations of the summary judgment standard in "run of the mill civil cases[s]," *Anderson*, 477 U.S. at 252, but none from public figure defamation cases, the court stated (App. 15a-16a):

> . . . we conclude that there are *genuine issues of material fact* so as to necessitate the presentation of this case to a jury. Unlike the circuit court, we are not firmly convinced that the factual issues herein have been finally resolved. *Specifically, before this Court, the parties repeatedly and continuously have argued the facts giving rise to the instant appeal and whether the allegedly defamatory statements were tainted with falsity or laced with malice.* When faced with such an ongoing factual dispute, and inferences that, if viewed in the nonmovant's favor, could support a verdict for the nonmovant, *we must not continue to harbor these doubts as to whether summary judgment is appropriate but*

Based on published reports, the Committees moved on July 9, 2001, to disqualify Justice Starcher because he was campaigning for election to the Supreme Court of Appeals on Ms. Pritt's campaign bus in 1996 while the disputed advertisements were airing, and had also made public comments suggesting bias in her favor in the instant case. App. 34a. By letter and order dated July 10, Justice Starcher refused to recuse. App. 32a-35a. On October 2, the day before oral argument, Justice Maynard disclosed for the first time that he had also campaigned with Ms. Pritt in 1996, and recused *sua sponte*. App. 36a. At oral argument, Justice Davis disclosed publicly for the first time that, like Justices Maynard and Starcher, she had also campaigned with Ms. Pritt in 1996. In the absence of objection by the parties, however, Justice Davis did not recuse, and eventually authored the majority opinion. For a discussion of the unique recusal policies of the West Virginia Supreme Court of Appeals, see *Dababnah v. West Virginia Board of Medicine*, 47 F. Supp.2d 734, 749-50 (S.D. W. Va. 1999).

> *rather hand the case over to a jury, in whose province such factual determinations lie.* Accordingly, we reverse the circuit court's ruling granting summary judgment to RNC. . . . (emphasis added).[7]

The "ongoing factual dispute" referred to by the Court was *not* a conflict in the evidence concerning actual malice, but the conflict between Ms. Pritt's *claim* that the record contained such evidence, and the Committees' insistence that the record contained no such evidence. Contrary to this Court's instructions, the Supreme Court of Appeals failed to conduct an "independent review" of the record to assure that it contained the requisite clear and convincing evidence of actual malice.[8] Accordingly, as we show below, the Supreme Court of Appeals selected and applied the incorrect legal precept, leading it to err as a matter of law.

Noting that "it has come to our attention that the litigation of a cause of action for defamation can prove to be a daunting task for even the most learned jurist or the most

---

[7] Justices Albright and Starcher filed a concurring opinion stating that a "genuine issue of material fact" as to actual malice was created by the question of "what Appellees, or either of them, *knew or should have known* regarding the factual content and the context of the commercials." App. 22a (emphasis added). These Justices confused actual malice with negligence, which is insufficient to sustain a public figure defamation action. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991).

[8] In a footnote, the lower court alluded to deposition testimony from two state senators proffered by Ms. Pritt to demonstrate that the advertisements were false. App. 16a n.10. Neither deponent did or could speak to the Committees' alleged knowledge or recklessness. Accordingly, this proffered testimony had no bearing on the issue of actual malice.

experienced counselor," the Supreme Court of Appeals also re-stated several settled principles of defamation jurisprudence "in an attempt to clarify this nebulous area of law." App. 17a. In a footnote, the court paid lip service to one of the very principles that it ignored in deciding the case: that as a public figure Ms. Pritt was required to "resist a motion for summary judgment by showing clear and convincing evidence of actual malice." App. 20a-21a n.14. The court then erroneously disregarded this rule, asserting that it was "no longer relevant" because the case "cannot be disposed of summarily." *Id.* Thus, the court reversed the grant of summary judgment without determining whether the record contained clear and convincing evidence of actual malice.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Appeals fundamentally misunderstood or ignored its responsibilities under the First Amendment. Not only does the decision below defy the settled First Amendment jurisprudence of this Court, it also conflicts with the many state courts and federal courts of appeals that have properly fulfilled their obligations in public figure defamation cases. Unless and until corrected by this Court, the precedent below threatens to chill political speech and diminish public discourse about public figures throughout West Virginia and adjacent States. The First Amendment cannot countenance this result.

I. THE DECISION BELOW IS CONTRARY TO THIS COURT'S CLEAR RULINGS ON THE ROLE OF APPELLATE COURTS IN PUBLIC FIGURE DEFAMATION CASES.

Over the last four decades, this Court has consistently emphasized two rules imposed by the First Amendment in public figure defamation cases: (1) plaintiffs must prove by clear and convincing evidence that defamatory statements

were made with actual malice; and (2) appellate courts must independently review the factual record to determine whether such evidence exists. First set forth in *New York Times*, these rules are coextensive and mutually reinforce each other. Later, in *Anderson*, this Court confirmed that the "clear and convincing" standard of proof applies at the summary judgment stage. By failing to conduct an independent review of the record, and then holding that mere disagreement by the parties about the content of the record is sufficient to avoid summary judgment, the Supreme Court of Appeals misunderstood the unique duty of independent review in defamation cases imposed upon it by the First Amendment.

A. In Public Figure Defamation Cases, the First Amendment Requires Independent Appellate Review To Assure That the Record Contains Clear and Convincing Evidence of Actual Malice.

This Court established the bedrock First Amendment requirement of actual malice in *New York Times*. There, a public official alleged that he was injured by inaccurate statements in an advertisement published by the New York Times newspaper. Although falseness was "uncontroverted," 376 U.S. at 258, this Court *reversed* a decision of the Alabama Supreme Court that upheld a jury verdict for plaintiff, and ordered entry of judgment for defendants. *Id.* at 292.

This Court's ruling was premised on its conclusion that falseness alone is not sufficient for a public official to prove libel. To the contrary, emphasizing our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," *id.* at 270, the Court ruled that "[e]rroneous statement is inevitable in free debate, and [i]t must be

protected if the freedoms of expression are to have the 'breathing space' that 'they need . . . to survive.'" *Id.* at 271-72. To secure the protections of the First Amendment, the Court required that defamation plaintiffs who are public officials must prove that a publisher made a false statement with "actual malice" – that is, with knowledge that it was false, or with a "reckless disregard" for whether it was false or not. *Id.* at 280-81. The Court further required that actual malice must be proved with "convincing clarity." *Id.* at 285-86.[9]

After setting forth the actual malice requirement, the Court in *New York Times* reviewed the evidence on this dispositive issue. As it carefully explained, the Court's independent review of the record was compelled by the same First Amendment principles that require proof of actual malice:

> This Court's duty is not limited to the elaboration of constitutional principles; *we must also in proper cases review the evidence* to make certain that those principles have been constitutionally applied. *This is such a case*, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see

---

[9] This Court later extended the actual malice requirement to *all* public figure defamation plaintiffs. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (defamation claims of university athletic director). The "clear and convincing proof" standard of proof for actual malice also applies to the defamation claims of all public figures. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

> . . . whether they are of a character which the principles of the First Amendment . . . protect.' *We must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.*

Id. at 285 (citations omitted) (emphasis added).

This Court reiterated the need for "clear and convincing" proof of actual malice and an independent appellate review of the record in *Bose Corporation v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984). There, the district court had ruled, after a 19-day bench trial, that plaintiff had sustained its burden of proving actual malice. *Id.* at 491. The First Circuit reversed based on its own review of the factual record. *Id.* at 491-92. After a comprehensive analysis of First Amendment precedents, this Court affirmed, stating that:

> The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. . . . It reflects a deeply held conviction that *judges* – and particularly Members of this Court – *must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.* The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. *Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing evidence of 'actual malice.'*

Id. at 510-11 (emphasis added). This Court conducted its own review of the record evidence, *id.* at 511-14, and concluded that plaintiff's evidence of actual malice was not "clear and convincing." *Id.* at 513. Reiterating its basic ruling, the Court held that "[a]ppellate judges" in a case "governed by *New York Times* . . . must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Id.* at 514.[10]

B. The Requirement for Independent Review To Assure That the Record Contains "Clear and Convincing" Proof of Actual Malice Applies at the Summary Judgment Stage of a Public Figure Defamation Case.

This Court expressly extended the reasoning of *New York Times* and its progeny to the summary judgment setting in *Anderson*. *Anderson* came to this Court in a procedural

---

[10] This Court has consistently maintained these strict requirements. In *Time, Inc. v. Pape*, 401 U.S. 279 (1971), the district court directed a verdict against a public figure's defamation claims and the court of appeals reversed because it discerned evidence of actual malice. Labeling the actual malice requirement a "constitutional rule," this Court conducted its own review of the record and concluded that the evidence of actual malice did *not* warrant a trial. *Id.* at 284-92. In *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), a state trial court entered judgment for plaintiff on his defamation claims and the state supreme court affirmed. This Court reversed, however, after conducting an independent review "as a matter of constitutional law" and finding insufficient evidence of actual malice. *Id.* at 277. In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), the court of appeals reviewed the trial record and affirmed a jury verdict in favor of the plaintiff, a candidate for political office. *Id.* at 662-63. Although this Court also affirmed upon its own review of the record, it noted that discussion of a candidate's qualifications presents "the strongest possible case for independent review." *Id.* at 686-87.

posture identical to this case. In *Anderson*, the district court granted summary judgment in favor of defendants in a public figure defamation action, on the ground that defendants' investigation, research, and reliance on numerous sources precluded a finding of actual malice by clear and convincing evidence. 477 U.S. at 246. The D.C. Circuit reversed and remanded, holding that the heightened evidentiary burden imposed by *New York Times* did not apply at the summary judgment stage, and concluding that its own independent review of the record demonstrated that a jury could "reasonably conclude" that actual malice was present. *Id.* at 247.

This Court *reversed* the D.C. Circuit and held that "the inquiry involved in a ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Id.* at 252. Expressly contrasting the approach to summary judgment "in a run-of-the-mill civil case" with that in a public figure defamation case "where the First Amendment mandates a 'clear and convincing' standard," *id.* at 252, the Court held that the appropriate summary judgment inquiry in a pubic figure defamation case is "whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Id.* at 255-56. The Court placed the burden of coming forward with the necessary clear and convincing proof squarely on the plaintiff, who must proffer "concrete evidence" and "specific facts" demonstrating actual malice. *Id.* at 249, 256. In view of these requirements, the Court

remanded the case for application of the "clear and convincing" standard of proof. *Id.* at 257.[11]

C. The Supreme Court of Appeals Failed To Review the Record and Failed To Apply the "Clear And Convincing" Standard of Proof for Actual Malice.

Despite the clear weight of this Court's decisions, the Supreme Court of Appeals misunderstood its duty of independent review of the record. Glaringly, the lower court, like Ms. Pritt, failed to identify any "concrete evidence" or "specific facts" pertinent to the question whether defendants knew the challenged statements were false, or recklessly disregarded the falseness of those statements. The court's failure to recite any such evidence is fully explained by its observation that "before this Court, the parties repeatedly and continuously have argued the facts . . . whether the allegedly defamatory statements were . . . laced with actual malice." App. 15a. Rather than "continue to harbor these doubts about whether summary judgment is appropriate," the lower court should have simply examined the record; by failing to do so, it defaulted on its duty of independent review by "hand[ing] the case over to a jury." App. 15a. Under the lower court's reasoning, any unsubstantiated claim by a defamation plaintiff regarding the content of the record would preclude summary judgment and require a

---

[11] This Court reaffirmed the central holding of *Anderson* in *Masson*. There, the trial court granted defendants summary judgment in a public figure defamation action, and, after an extensive review of the record, the court of appeals affirmed. *Masson*, 501 U.S. at 508-09. This Court conducted its own review of the record, *id.* at 521-25, however, and reversed, ruling that there was "sufficient additional evidence . . . [which] would support a jury determination under a clear and convincing standard" that actual malice was present. *Id.* at 521.

burdensome, expensive, and uncertain trial. Indeed, because a directed verdict motion poses the same essential questions as a summary judgment motion, *Anderson*, 477 U.S. at 250-51, the lower court has virtually guaranteed that public figure defamation cases in West Virginia courts must proceed all the way to verdict. The Supreme Court of Appeals was plainly wrong. *See Anderson*, 477 U.S. at 255-56; *Bose*, 466 U.S. at 511; *New York Times*, 376 U.S. at 285.

The Supreme Court of Appeals also failed to apply the "clear and convincing" standard to Ms. Pritt's allegation of actual malice. Although the court recognized the general applicability of this heightened standard of proof, it deemed the standard "no longer relevant" because the case "cannot be disposed of summarily." App. 20a n.14. This conclusion is precisely *backwards*, because the decision that summary judgment was inappropriate should have been based on the presence of clear and convincing evidence of actual malice. *See Anderson*, 477 U.S. at 252, 256; *Masson*, 501 U.S. at 521. Because the court failed to conduct the requisite independent review of the record for evidence of actual malice, its conclusion that the case "cannot be disposed of summarily" was premature, unsupported by evidence, and incorrect as a matter of law.

II. THE DECISION BELOW CONFLICTS WITH RULINGS FROM THE VAST MAJORITY OF STATE COURTS AND FEDERAL COURTS OF APPEALS.

In view of the extraordinary burdens that erroneous lower court decisions can impose on constitutionally-protected speech, this Court has granted certiorari, even without conflicts among the circuits or state courts of last resort, to assure that First Amendment limits are respected. *See, e.g., Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 565-66 (1977) (granting certiorari to review Ohio Supreme Court ruling on the First Amendment implications

of state law "right of publicity," despite absence of conflicts among the lower courts); *Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 8 (1970) (same, to review Maryland Court of Appeals ruling on "actual malice" jury instruction; "We granted certiorari to consider the constitutional issues presented."). The decision below presents an *a fortiori* case for exercise of this Court's certiorari jurisdiction because, in addition to its tendency to suppress core political speech (*see* Part III below), it squarely conflicts with rulings from most state courts of last resort and federal courts of appeals.

The majority of state high courts have respected and shouldered their duty of independent appellate review to enforce the need for "clear and convincing" proof of actual malice in public figure defamation cases. For example, in *Guilford Transportation Industries, Inc. v. Wilner*, 760 A.2d 580 (D.C. 2000), the District of Columbia Court of Appeals affirmed the trial court's entry of summary judgment against the defamation claims of a public figure. The court ruled, in particular, that the First Amendment required it to "make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 593 (quotation omitted). As part of its examination, the court set out the facts underlying plaintiff's allegations of actual malice and concluded that those allegations were not supported by clear and convincing evidence. *Id.* at 583-87.

Similarly, in *Journal-Gazette Company, Inc. v. Bandido's, Inc.*, 712 N.E.2d 446 (Ind.), *cert. denied*, 528 U.S. 1005 (1999), the trial court entered summary judgment against a public figure plaintiff's defamation claims, the intermediate appellate court reversed and remanded for trial, and the Indiana Supreme Court reversed and reinstated summary judgment. In rendering its decision, the state supreme court held that it is bound to use an "independent examination of the whole record as the standard of review

when proof of actual malice is required as a matter of federal constitutional law in defamation cases." *Id.* at 455-56. After reciting the pertinent facts, the court concluded that the evidence of actual malice was not clear and convincing. *Id.* at 456-69.

The West Virginia court conducted no such review in this case. Indeed, the decision below sets out no facts bearing on actual malice but merely seizes upon the parties' disagreement about whether the record contains sufficient evidence to preclude summary judgment, and then asserts that the "clear and convincing" standard does not apply because unidentified "issues of material fact" preclude summary judgment. App. 15a, 20a n.14. The decision below therefore conflicts with this Court's decisions in *New York Times*, *Anderson*, and *Bose*, as well as *Guilford*, *Journal-Gazette*, and many other state court decisions.[12]

---

[12] *See, e.g., Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 120 (Tex. 2000) ("It is not enough for us . . . to determine that a reasonable jury could have found that [defendant] acted with actual malice. Beyond that, we ourselves must conclude that the evidence of malice is clear and convincing."); *Fitzgerald v. Tucker*, 737 So.2d 706, 716 (La. 1999) ("[O]ur scope of review is to examine in depth the 'statements in issue' and the 'circumstances under which they were made,' and to 're-examine the evidentiary basis' of the lower court decision in the light of the Constitution."). *Accord Pemberton v. Birmingham News Co.*, 482 So.2d 257, 260 (Ala. 1985); *Dombey v. Phoenix Newspapers, Inc.*, 724 P.2d 562, 572 (Ariz. 1986); *Thomson Newspaper Publ'g, Inc. v. Coody*, 896 S.W.2d 897, 901 (Ark.), *cert. denied*, 516 U.S. 1008 (1995); *McCoy v. Hearst Corp.*, 727 P.2d 711, 715-16 (Cal. 1986) (in bank), *cert. denied*, 481 U.S. 1041 (1987); *DiLeo v. Koltnow*, 613 P.2d 318, 323-24 (Colo. 1980) (en banc); *Kanaga v. Gannett Co., Inc.*, 687 A.2d 173, 176 (Del. 1996); *Wiemer v. Rankin*, 790 P.2d 347, 357 (Idaho 1990); *Wanless v. Rothballer*, 503 N.E.2d 316, 320 (Ill.), *cert. denied*, 482 U.S. 929 (1987); *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 904-05 (Iowa 1996); *Tucci* (continued...)

Also in contrast to the court below, the federal courts of appeals have applied this Court's public figure defamation requirements correctly. For example, in *Secrist v. Harkin*, 874 F.2d 1244 (8th Cir.), *cert. denied*, 493 U.S. 933 (1989), the Eighth Circuit affirmed the district court's entry of summary judgment against a public figure plaintiff's defamation claims. *Id.* at 1253. In evaluating whether summary judgment was properly granted, the court of appeals ruled that it was "obliged to make [its] own independent review of the record to ensure the principles of actual malice are constitutionally applied." *Id.* at 1251. The court set out and carefully reviewed the evidence, which it determined would *not* "support a jury finding that [plaintiff]

---

v. Guy Gannett Publ'g Co., 464 A.2d 161, 167 (Me. 1983); *Chesapeake Publ'g Corp. v. Williams*, 661 A.2d 1169, 1176 (Md. 1995); *McAvoy v. Shufrin*, 518 N.E.2d 513, 516 (Mass. 1988); *Rouch v. Enquirer & News of Battlecreek Michigan*, 487 N.W.2d 205, 212 (Mich. 1992), *cert. denied*, 507 U.S. 967 (1993); *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990), *cert. denied*, 498 U.S. 1119 (1991); *Gulf Publ'g Co., Inc. v. Lee*, 434 So.2d 687, 696 (Miss. 1983); *Deaver v. Hinel*, 391 N.W.2d 128, 131 (Neb. 1986); *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 655 A.2d 417, 423 (N.J. 1995), *cert. denied*, 516 U.S. 1066 (1996); *Mahoney v. Adirondack Publ'g Co.*, 517 N.E.2d 1365, 1369 (N.Y. 1987); *Dale v. Ohio Civil Serv. Employees Ass'n*, 567 N.E.2d 253, 255 (Ohio), *cert. denied*, 501 U.S. 1231 (1991); *Herbert v. Oklahoma Christian Coalition*, 992 P.2d 322, 328 (Okla. 2000); *Lyons v. Rhode Island Pub. Employees Council*, 559 A.2d 130, 134-35 (R.I.), *cert. denied*, 493 U.S. 892 (1989); *Peeler v. Spartan Radiocasting, Inc.*, 478 S.E.2d 282, 284 (S.C. 1996), *cert. denied*, 520 U.S. 1275 (1997); *Margoles v. Hubbart*, 760 P.2d 324, 326 & n.6 (Wash. 1988) (en banc); *Torgerson v. Journal/Sentinel, Inc.*, 563 N.W.2d 472, 478-79 (Wisc. 1997); *MacGuire v. Harriscope Broad. Co.*, 612 P.2d 830, 833 (Wyo. 1983). *But see Miami Herald Publ'g Co. v. Ane*, 458 So.2d 239, 242 (Fla. 1984) (purporting to apply rule of independent review, but describing no evidence).

has shown with convincing clarity that a defendant acted with actual malice." *Id.* at 1252.

The D.C. Circuit applied the same level of scrutiny in *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1010 (1989), in which it also affirmed entry of summary judgment against a public figure plaintiff's defamation claims. After the court conducted a "thorough review of the record" and set forth the evidence, it determined that plaintiff had failed to prove actual malice by clear and convincing evidence. *Id.* at 601.

As noted above, the West Virginia court conducted no factual review and failed to apply the proper evidentiary standard. The decision below therefore conflicts with *Secrist* and *Liberty Lobby*, along with rulings from nearly all other federal courts of appeals.[13]

---

[13] *See, e.g., Cobb v. Time, Inc.*, No. 00-5159, 2002 WL 112477, at *7 (6th Cir. Jan. 30, 2002) ("The unique nature of the interest protected by the actual malice standard requires that reviewing courts conduct an independent review to determine whether that standard has been met."); *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 127 (1st Cir. 1997) ("appellate judges must conduct a whole-record review"); *Newton v. NBC, Inc.*, 930 F.2d 662, 669, 672 (9th Cir.) (it "is necessary to state in some detail the evidence on the actual malice issue" in order to review evidence "with the searching care required to protect First Amendment values"), *cert. denied*, 502 U.S. 866 (1991). *Accord Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1241 (11th Cir. 1999), *cert. denied*, 528 U.S. 1198 (2000); *Anderson v. McCotter*, 100 F.3d 723, 725 (10th Cir. 1996); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 708, 714-15 (4th Cir.) (en banc), *cert. denied*, 501 U.S. 1212 (1991); *Contemporary Mission, Inc. v. New York Times Co.*, 842 F.2d 612, 622 (2d Cir.), *cert. denied*, 488 U.S. 856 (1988); *Bartimo v. Horsemen's Benevolent & Protective Ass'n*, 771 F.2d 894, 898 (5th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1088 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985).

III. IF NOT CORRECTED, THE DECISION BELOW WILL HAVE PROFOUND CONSEQUENCES FOR POLITICAL SPEECH IN WEST VIRGINIA AND ADJACENT STATES.

Unless and until corrected, the Supreme Court of Appeals' decision will have an immediate and far-reaching impact well beyond the parties to this case. With trial now scheduled for June 2003, and inevitable appeals lasting for years thereafter, two and perhaps three federal and state election cycles will run their course in West Virginia before this Court might have another opportunity to correct the lower court's error. Perhaps ironically, if the Committees prevail at trial, the Supreme Court of Appeals' erroneous view of summary judgment in defamation cases may evade correction indefinitely. For however long the lower court decision remains good law, it will engender a coercive threat of defamation litigation, not terminable by summary judgment even in wholly meritless cases, that will chill free and open political debate.

For decades, this Court has repeatedly recognized that the First Amendment guarantee of free speech "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.*, 401 U.S. at 272.[14] This is particularly true for the type of

---

[14] *See also Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) (political speech is "core First Amendment activity"); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (political speech is an "area of the most fundamental First Amendment activities" entitled to the "broadest protection"); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (a "major purpose" of the First Amendment is to "protect the free discussion of governmental affairs"); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (the "opportunity for free political discussion" is a "fundamental principle of our constitutional system").

candidate-focused speech at issue in this case because "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." *Eu v. San Francisco Cty. Democratic Cen. Comm.*, 489 U.S. 214, 223 (1989) (quotation omitted). And, of course, nothing in the lower court's opinion limits its erroneous view of defamation summary judgment procedure to cases arising out of political contests; it is equally applicable to any defamation suit brought by any public figure.

The decision below, if not corrected, threatens to undermine bedrock First Amendment principles. Put simply, speakers in West Virginia are now much more likely to face burdensome, costly, and uncertain jury trials as a result of any speech that is critical of public figures. By thus weakening summary judgment procedures in these cases, the lower court has dramatically increased the probability of protracted litigation concerning political speech. As this Court has repeatedly recognized, speakers will doubtless respond by curtailing their criticism of public figures, thereby depriving voters of information that is vital to our system of self-government. This is precisely what the actual malice requirement was designed to prevent.

This danger is not limited to political party committees such as the RNC. To the contrary, the decision below threatens to unleash a torrent of litigation against *all* those who engage in political speech. Newspapers and broadcast media outlets that criticize public officials or candidates for office, independent groups, and candidates themselves who may speak harshly of their opponents during the rough-and-tumble of campaigning, are equally vulnerable to trials for their political speech under West Virginia's new regime.

The consequences of self-censorship are brought into stark relief by the important role that political advertising

plays in our Nation's electoral process. Political advertisements are the "prime method for communicating with voters in geographically large districts and as such are potent tools for changing minds and ultimately winning elections." Brennan Center for Justice, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* 13 (2002). Reflecting their unsurpassed importance, a huge number of political advertisements are published in each biennial election cycle. During the 1999-2000 cycle, for example, 3,327 unique political spots aired on television in federal, gubernatorial, and judicial elections in the Nation's top 75 media markets alone, *id.* at 29, of which 4 reach into West Virginia. Warren Communications News, *Television & Cable Fact Book* A-1364 (2001). These advertisements aired a total of 940,755 times, at a cost of over $672 million. *Buying Time* at 29. Although representing only a fraction of the political advertising that occurs each year, these totals illustrate the potentially profound impact of the decision below.

This impact will be particularly onerous for non-party entities, which are responsible for a substantial amount of political speech in the United States. For example, approximately $347 million of the estimated $509 million spent nationwide on "issue advocacy" advertisements during the 1999-2000 election cycle was spent by groups *other than* Republican and Democratic party organizations.[15] Annenberg Public Policy Center, *Issue Advertising in the 1999-2000 Election Cycle* 4-5 (Feb. 1, 2001). In view of the decision below, each of these groups, along with the media and candidates themselves, face the same dilemma in West

---

[15] "Issue advocacy" is a term used for political speech that does not expressly advocate the election or defeat of an identified candidate. *See generally Buckley*, 424 U.S. at 44 & n.52.

Virginia: either limit the exercise of core political speech or prepare to defend against protracted litigation by plaintiffs whose ability to proceed to trial has been greatly (and unconstitutionally) enhanced. This dilemma is antithetical to the First Amendment. *Philadelphia Newspapers*, 475 U.S. at 777.

Speech that is most subject to defamation litigation is, in the view of one respected observer, quite helpful and informative to voters. "[N]egative advertisements actually contain *more* relevant issue content than ads containing no information about the sponsor's opposing candidate." Kathleen Hall Jamieson, *Everything You Think You Know About Politics . . . And Why You're Wrong* 104 (2000) (emphasis added). Therefore, suppression of such speech not only offends the First Amendment; it also will deprive the public of valuable information about candidates.

It is also worth noting that the chilling effect of the lower court's decision is not confined to West Virginia. The Washington, D.C., Pittsburgh, Pennsylvania, Roanoke, Virginia, and other, smaller out-of-state media markets also play into West Virginia. *See Television & Cable Fact Book* A-1364. News reports of public officials' activities, as well as political debate, in these markets may well be subjected to defamation litigation in West Virginia courts.

In sum, by permitting defamation cases brought by plaintiffs such as Ms. Pritt to proceed to trial without clear and convincing proof of actual malice, the Supreme Court of Appeals has stripped away a layer of First Amendment protection that is crucial to the public discussion of political issues. Instead of securing the widest dissemination of information, the decision below threatens to mute many political speakers, hindering the speech that is most "integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14.

CONCLUSION

For the reasons stated above, petitioner Republican National Committee respectfully urges this Court to grant this Petition.

Respectfully submitted,

Bobby R. Burchfield
Counsel of Record
Jason A. Levine
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Attorneys for Petitioner

Michael E. Toner
Chief Counsel
Thomas J. Josefiak
Counsel
Charles R. Spies
Deputy Counsel
REPUBLICAN NATIONAL COMMITTEE
310 First Street, S.E.
Washington, D.C. 20003
(202) 863-8638

Of Counsel

March 7, 2002